

**H.R. 3405, STRENGTHENING THE
OWNERSHIP OF PRIVATE PROP-
ERTY ACT OF 2005 (STOPP)**

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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**LEGISLATIVE HEARING ON H.R. 3405,
STRENGTHENING THE OWNERSHIP OF PRIVATE
PROPERTY ACT OF 2005 (STOPP).**

**Thursday, October 27, 2005
U.S. House of Representatives
Committee on Resources
Washington, D.C.**

The Committee met, pursuant to call, at 10:03 a.m. in Room 1324 Longworth House Office Building, Hon. Richard W. Pombo, Chairman, Committee on Resources, presiding.

Present: Pombo, Gibbons, Pallone, Drake, and Herseth.

STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The CHAIRMAN. The Committee will come to order. We are holding a hearing today on H.R. 3405, Strengthening the Ownership of Private Property Act of 2005.

Property rights are the heart of individual freedom and the foundation for all other civil rights guaranteed to Americans by the Constitution. Without the freedom to acquire, possess, and defend property, all other guaranteed rights are merely words on a page.

The Fifth Amendment holds that private property shall not be taken by the government for public use without just compensation. These safeguards have been under assault for decades. And until now, the typical victims were family farmers and ranchers in the West.

The Supreme Court's decision in *Kelo v. the City of New London* case to allow local governments to declare eminent domain in this case goes beyond compensation. It wholly perverts the intent of public use, and in so doing, may turn the American dream of home ownership into a nightmare. It has delivered the property rights assault from rural America right to the doorsteps of suburbia.

In New London, Connecticut, city planners essentially decided that evicting 15 homeowners from their homes was in the greater good as a public use for an office park and new condos. But the public, to be directly served in this case, was a private corporation. Whether they were newlywed couples in their first home or lifelong residents who own their homes outright, whether it is farmers and ranchers who have been on their land for generations or suburban communities with the promise of fellowship, this appalling behavior cannot be tolerated anymore.

The Supreme Court's decision to allow local government to declare eminent domain turns the Fifth Amendment on its head. We cannot forget about rural America, as well. Rural America deserves greater protections, too, more than a mere Sense of Congress. No longer will public use correctly be defined as a road, a bridge, a school, or a hospital. It can be defined as an abstract greater good, such as increased tax revenue or economic development.

Private property can now be taken at will by government and reallocated to another private entity if it runs afoul of a local bureaucrat's notion of public use and greater good.

Fortunately, Congress maintains the power over the purse strings. We will act to minimize the effects of this ruling to the greatest extent possible. States and local communities alike are recognizing the importance of private property rights, and are beginning to act to protect themselves from this decision. We have a chance at real reform here, but should we have such a narrow focus on private property protections?

Should we include intellectual private property rights protections in this bill, as well? Why just a Sense of Congress for rural America? Aren't these important enough issues to address in this bill?

I hope when we eventually go to the Floor with the bill, we do not shortchange property owners for political expedience. I have been fighting these injustices since before I was elected to this body, and will continue to do so in the future.

[The prepared statement of Chairman Pombo follows:]

**Statement of The Honorable Richard Pombo, Chairman,
Committee on Resources**

Property rights are the heart of individual freedom and the foundation for all other civil rights guaranteed to Americans by the Constitution. Without the freedom to acquire, possess and defend property, all other guaranteed rights are merely words on a page.

The Fifth Amendment holds that private property shall not be taken by the government for public use without just compensation. These safeguards have been under assault for decades and until now, the typical victims were family farmers and ranchers in the West.

The Supreme Court's decision in the *Kelo v. City of New London* case to allow local governments to declare eminent domain in this case goes beyond compensation; it wholly perverts the intent of public use, and in so doing, may turn the American dream of home ownership into a nightmare. It has delivered the property rights assault from rural America right to the doorsteps of suburbia.

In New London, Connecticut, city planners essentially decided that evicting 15 homeowners from their homes was in the "greater good" as a "public use" for an office park and new condos. But the public, to be directly served in this case, was a private corporation. Whether they were newly-wed couples in their first home or life-long residents who owned their homes outright, whether it is farmers and ranchers which have been on their land for generations or suburban communities with the promise of fellowship, this appalling behavior cannot be tolerated any more. The Supreme Court's decision to allow local governments to declare eminent domain turns the Fifth Amendment on its head. We cannot forget about rural America as well. Rural America deserves to be greater protections too, not just a Sense of Congress.

No longer will public use correctly be defined as a road, bridge, school or hospital, it can be defined as an abstract greater good, such as increased tax revenue or economic development. Private property can now be taken at will by government and reallocated to another private entity if it runs afoul of a local bureaucrat's notion of public use and greater good.

Fortunately, Congress maintains the power over the purse strings. We will act to minimize the effects of this ruling to the greatest extent possible. And, States and local communities alike, recognizing the importance of private property rights, have also begun to act to protect themselves from this decision. We have a chance at real

reform here. Should we have such a narrow focus on private property protections? Should we include intellectual property rights protections on the Floor? Why just a Sense of Congress for rural America? Aren't these important enough issues to address in this bill? I hope when we go to the Floor with whatever bill, we do not short shift property owners for political expedience. I have been fighting these injustices since before I was elected to this body and will continue to do so in the future.

The CHAIRMAN.Mr. Pallone.

**STATEMENT OF THE HON. FRANK PALLONE, JR., A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF
NEW JERSEY**

Mr. PALLONE. Mr. Chairman, I want to thank you for holding this hearing. And although I didn't hear everything you said, I want you to know that I agree with all of it, at least what I heard from when I came in.

I have grown concerned with the increasing rate of eminent domain abuse cases across the country. Eminent domain has often been properly invoked to allow for the building of new roads, public facilities, and critical military infrastructure.

In 2000, however, with the City of New London, Connecticut case, the City condemned 15 homes so a developer could build offices, a hotel, and a convention center. Suzette Kelo and her neighbors spent years in the legal battle that culminated in June, when the U.S. Supreme Court ruled five to four against them.

The Kelo v. New London ruling set a disturbing precedent, in my opinion, the precedent that a town has the right to invoke eminent domain in the name of so-called economic revitalization. This decision raises serious concerns about whether there are any limits to the government's power with regard to the takings clause of the Constitution.

I strongly oppose the majority's opinion in the Kelo case. This decision weakens the basic Constitutional protection against taking private property for private uses. Our founding fathers were clear when they drafted the Fifth Amendment, writing that the government could only take private property for public use, provided that property owners are paid just compensation.

I agree with Justice Sandra Day O'Connor's dissenting opinion in Kelo. She made clear that there have been appropriate uses of eminent domain throughout history, but that without the proper safeguards, eminent domain can easily be abused.

My State of New Jersey is particularly prone to eminent domain abuse because of our high real estate prices and plentiful beachfront property in my district. Municipalities that want to make way for luxury housing in the name of economic revitalization can easily replace a well-kept middle or working class community. And that is definitely not what our founding fathers meant when they wrote the Fifth Amendment.

Now, I understand that eminent domain is necessary in rare and exceptional circumstances involving a public health or safety crisis, but is not appropriate to allow residents of our communities to be displaced for luxury condominiums without giving any thought to where the people from these communities would go.

That is why I have also introduced my own legislation to curb the inappropriate use of eminent domain. The Protect Our Homes

Act that I have introduced simply states that there should be no taking of homes for economic development unless there are rare and exceptional circumstances involving a public health or safety crisis. This legislation would render any state or local government that does otherwise ineligible for Federal financial assistance under any program administered by the Department of Housing and Urban Development.

It would also put in place appropriate safeguards to ensure that any eminent domain process is fair and transparent.

Finding the right balance between a state or municipality's rights in Federal involvement is never easy. But with this particular issue, Congress must take action. We have an obligation to protect our citizens as we revitalize our aging neighborhoods. We should not sit idly by and tolerate abuses of eminent domain in the name of economic revitalization. It is time we strengthened the Federal law to guarantee that homeowners throughout this great country are protected.

And again I want to commend the Chairman for holding this hearing. I commend Mr. Bonilla for working to put together this legislation. And I look forward to hearing from the witnesses and working further so that we can actually accomplish something on this very important issue.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Mr. Gibbons, did you have an opening statement?

**STATEMENT OF THE HON. JIM GIBBONS, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF NEVADA**

Mr. GIBBONS. I do, Mr. Chairman, very briefly though, if you would permit me. Thank you. And again, Mr. Chairman, thank you for your leadership in bringing this bill before us today.

I, like many of my colleagues, believe that the recent Kelo Supreme Court decision went against the basic principles of our democracy, and was a slap in the face of private property rights. And as a Congress, it is our responsibility to uphold the Constitution and the rights of the American people to own property, and not to worry that it will be taken for a greater private good.

The Kelo decision is a travesty, and a direct contradiction to the intent of the framers of the Constitution. And I am sure that we can all see the dangers, the imminent dangers that are posed by the Kelo decision in our communities, in our states, and throughout districts across America. And I am sure the framers of the Constitution never intended for state and local governments to use eminent domain to give an advantage to one private property owner over another.

I am pleased to be here today to receive the testimony and to hear and discuss this legislation, to address the misguided Kelo decision, and the abuse of powers of eminent domain that it represents. And I look forward to hearing from my good friends, Mr. Bonilla of Texas and Mr. Otter of Idaho. After all, Mr. Otter represents the Western Caucus Private Property Tax Force, which I am proud to be a member of. Both of these witnesses, Mr. Chairman, and their testimony today is particularly important to all of us, because they can speak to the broad range of property rights

challenges that are particularly important, and those that we face in the western states especially.

Again, Mr. Chairman, thank you. I look forward to the hearing; I look forward to the testimony by witnesses.

The CHAIRMAN. Thank you. Ms. Drake.

STATEMENT OF THE HON. THELMA DRAKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Ms. DRAKE. Thank you, Mr. Chairman. I also would like to thank you for holding this hearing so timely. I would like to thank the patrons of the bill for their work on this.

I have been involved in this issue of eminent domain for over 20 years. I am probably one of the few Members of Congress where an authority has tried to take my own personal home, but I can assure that I still live in my home, even though that was 17 years ago.

I think it is a basic right of Americans to own property and to know that they control the future of that property. It is part of our American dream.

I think, as distressed as I was with the Kelo decision, I think the good that will come from it is that we will see legislation in all 50 states to address it. I hope that Congress will continue to address issues that we can, and send a clear message to the Court that this was absolutely the wrong decision. And that in America, we believe in private property rights.

And I thank you, Mr. Chairman.

The CHAIRMAN. Thank you. One of the co-authors of the bill, Ms. Herseth.

STATEMENT OF THE HON. STEPHANIE HERSETH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH DAKOTA

Ms. HERSETH. Thank you, Mr. Chairman. And thank you for taking the time during this busy period to schedule a hearing on the strengthening of ownership of private property.

I want to acknowledge the hard work of Chairman Bonilla for his strong leadership on this issue, as well as Chairman Goodlatte, and your hard work, Chairman Pombo. I have been pleased to be part of this process, and Mr. Bonilla and I have been very pleased by the determined and thoughtful attention given to our legislation by champions of private property rights like yourself.

This legislation is a priority for many, including farmers and ranchers and landowners across my home State of South Dakota. I am extremely pleased that the Agriculture Committee took its primary jurisdiction on the STOPP Act seriously, and made reporting out the bill a priority. It is important, common-sense legislation that deserves our attention.

As my colleagues know, the Supreme Court decision in Kelo v. New London dealt a serious blow to fundamental property rights in the United States. This ruling allows governments to take private property from one landowner and give it to another private individual, so long as some economic development justification is given. In short, it means that governments can take your property, and give it to someone else.

I have been impressed by the widespread support for the proposition that this decision requires prompt Congressional action. And I am pleased that the leadership and Members of this Congress seem to agree that action on this legislation should be expedited.

As I have said before, South Dakotans from all walks of life have expressed their outrage about the Supreme Court's Kelo decision. As I have repeatedly noted in previous discussions of the STOPP Act, even Justice John Paul Stevens, the author of the Kelo decision, has expressed the feeling that the use of eminent domain by the City of New London was "unwise as a matter of policy." And I agree.

It is time for Congress to take action, and I am pleased to have been a part of that effort to craft a good bipartisan response that addresses these policy shortcomings by discouraging state and local governments from arbitrarily taking land from private landowners, and giving it to another party.

South Dakota is a rural state, and our population's livelihood is deeply tied to the land. This is true for virtually all of my state citizens, whether they live on a farm or in town. Because of this, the belief in private property rights runs strong and deep, and everyone that I have talked to back home on this matter has delivered the same message: landowners should not be vulnerable to the whims of a government that decides to take their land, and often their livelihood, just to give it to someone else who the government decides would deliver more in tax revenues.

I am pleased to say that many of my colleagues agree with this, which is why, in the short time since its introduction, as I mentioned, the STOPP Act has garnered broad bipartisan support because the legislation makes so much sense. I would encourage my colleagues here today to co-sponsor the bill, many of whom I know already have, and to continue to work with Chairman Pombo, Chairman Goodlatte, Chairman Bonilla, myself and others, to ensure that this issue is brought before the full House as soon as possible.

I think it is appropriate to mention at this time another bill being marked up by the Judiciary Committee as we speak. As many of you know, Chairman Bonilla and I drafted H.R. 3405 to provide a strong response to the Kelo decision. At the time we introduced the STOPP Act, the legislation produced by the Judiciary Committee, which took a similar approach by withholding Federal funds when eminent domain is used to facilitate a private-to-private transfer of property for economic development purposes, left open the possibility that a creative community or state could essentially shift funds within its budget to render the Federal response essentially meaningless.

In the words of Bob Stallman, President of the American Farm Bureau, in his testimony before the Agriculture Committee, "All of the Federal bills introduced thus far take this approach. The differences among them are the degree to which such funding is withheld. While we support all the approaches taken in these bills, H.R. 3405 seems to offer the most effective deterrent to abuses of eminent domain."

Yesterday I introduced legislation, along with Mr. Bonilla and Mr. Goodlatte once again, as well as Judiciary Committee

Chairman Sensenbrenner, Ranking Member Conyers and others, modeled heavily on the approach taken in the STOPP Act. I think this development is a testament to the hard work of individuals like Chairman Bonilla and Chairman Goodlatte, Ranking Member Peterson, you, Chairman Pombo, and others to develop, refine, and promote a strong common-sense approach to the situation presented by the Kelo decision.

As I have said, I am happy to have been part of these important efforts, and look forward to testimony from today's witnesses.

Thank you.

The CHAIRMAN. Thank you. At this time I recognize our first panel of witnesses: Henry Bonilla from the State of Texas, and Butch Otter from the State of Idaho.

Mr. Bonilla, you were the lead author of the bill that we are holding the hearing on today. And I know you acted very quickly after that decision, and, working in tandem with Ms. Herseth, were able to come up with legislation that a number of us became original co-sponsors on.

We appreciate all the work that you put into this, and we are looking forward to hearing from you.

**STATEMENT OF THE HON. HENRY BONILLA, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. BONILLA. Thank you, Mr. Chairman. I ask unanimous consent that my written testimony be entered into the record.

The CHAIRMAN. Without objection.

Mr. BONILLA. And I will just briefly summarize. As I listened carefully to the opening remarks that you made, Mr. Chairman, and other Members of your Committee, I think they speak to the heart of the issue.

The Kelo decision is one that created an uproar around the country, no matter where you lived, whether it was an urban area or a rural community. And I think for that reason, there is overwhelming support to do something about this outrageous ruling from the Supreme Court earlier this year that related, of course, to the New London, Connecticut, situation.

The bill, as Ms. Herseth points out, is a bipartisan bill. It is a rare moment in this town to see people standing side by side, in some cases who identify with the far right, and in some cases identify with the far left, to stand side by side and say that we need to get something done. And I think that if anyone looks at the list of Members that are co-sponsoring our legislation, it is a testament to the sincere effort that we have underway with House Bill 3405.

I also would like to commend you, Mr. Chairman, because from the first day you came to Congress, and you and I walked in the door the same day after the 1992 election, property rights was an issue that you have championed.

In some cases when people were working on other issues that perhaps are more popular at the moment, property rights has been the issue that you have championed day in and day out since you arrived here. And I want to commend you for that, as a believer in the Constitution, and in the rights granted by our forefathers, and how you have never lost sight of that. So you were a

trailblazer, and continue to be so. And I appreciate the strong support that you have given to this bill from the very beginning.

Again, we have an all-star cast that has been a part of this since we wrote the bill. And I cannot say enough about also Ms. Herseth, who was my partner in putting this bill together early on, and worked very hard.

The primary jurisdiction for this bill, although Resources obviously has a major role in moving this bill forward, is the Committee on Agriculture, of which Ms. Herseth is also a Member. And she has worked very hard to get co-sponsors and put the word out, and move this bill through the system.

And I am also glad to say that because of the work that we have done, as Ms. Herseth pointed out, there were other efforts pending that dealt with the same concept of cutting money off to communities that try to undertake a taking for private gain. But there were some loopholes in some of the bills. And although the Members who worked on those bills are very sincere in their efforts, we looked at those and closed the door on any ability to shift funds around, as Ms. Herseth said in her opening remarks. And because of the work that was done, the hard work by Chairman Goodlatte, this bill was reported out by that Committee by a vote of 40 to 1, Mr. Chairman. And again, it is unusual to see such strong, across-the-board support for just about anything except for naming a post office now and then in this town, but for an issue that is this significant to people across the country.

So thank you for your support. And Ms. Herseth, thank you for your willingness to get on board with me early on when you and I were the only ones who had our name associated with this bill. We have come a long way.

And Mr. Chairman, I appreciate your helping us move this bill down the road even farther. And the fact that we are going to actually, within a few days is my understanding, we are going to have this bill on the Floor. And we can all wear it as a badge of honor.

[The prepared statement of Mr. Bonilla follows:]

Statement of The Honorable Henry Bonilla, a Representative in Congress from the State of Texas

In July of 2004, the Supreme Court was petitioned to hear one of the most important property rights cases ever.

Earlier that year the Connecticut Supreme Court ruled that even if there is nothing wrong with your home or business, church or synagogue, or even your whole neighborhood or community, that government can still use eminent domain to take your property and transfer it to someone else for their private gain.

This ruling placed in jeopardy the very essence of the American way of life: that someone can start with nothing, build a family, a home, a business, and work to make his community better. This dream is directly threatened by the fear that while you work to create the American Dream, it may be taken away should government decide that another individual could create greater tax revenue. This fear is real and every individual who owns real property knows that homes generate less tax revenue than businesses and small businesses generate less tax revenue than larger ones.

The issue before the Court was brutally simple: does government enjoy protection under the Constitution to take property from one private party in order to give it to another private party for the purpose of increasing tax revenue and income? *Kelo v. New London* presented this question to the court in no uncertain terms.

The constitution of every state, as well as that of the US, requires that private property only be taken for "public use," such as transportation or public functions, not for private or commercial economic gain. The use of eminent domain authority to increase tax revenue is an abuse of the intent of "public use." Such takings are

arguably the most outrageous and broad action possible by government against its own citizens.

Not only does this decision put in jeopardy the ownership of property in our nation, it places ethical government in the crosshairs of those which who would seek to manipulate the system for their personal gain. Those with deep pockets and questionable intentions now have both the legal means and profit motive to sway local officials to do their bidding.

The Court's ruling in favor of New London creates a precedent that will hang like a stone around the neck of the average citizen, the small businessman, the common man. This stone will weigh down the rights of Americans trying to make a success of themselves through the sweat of their own brow.

Many feel that their voices cannot, and will not, be heard on this issue. As Members of Congress, it's our job to make sure that this stone is shattered and those voices are not only heard, but pushed to the forefront.

Several of our colleagues have answered this call and introduced pieces of legislation which we think could make a positive impact on the situation. However, these measures apply only to specific projects which have federal funding attached to their completion. While this is a great effort the fact is it does not go far enough. These measures have a loophole which localities may try to exploit. Each of these pieces of legislation take actions against specific projects in which the power of eminent domain is abused. The funding "shell-game" that would follow any federal action would see localities moving local and private funds into projects which are questionable all the while continuing to receive federal funding for other projects related to other economic development.

In order to address this issue, I, along with several of my colleagues here today, introduced the Strengthening The Ownership of Private Property, or STOPP Act. This bill confronts this issue head on with legislation to stop this practice in its tracks. This legislation would take much more comprehensive approach in preventing state and local entities from wrongly taking private property.

The first step is to make local governments follow the same guidelines imposed upon the federal government by the Uniform Relocation Act in instances where eminent domain powers are abused. This measure provides that the federal government must not only provide fair compensation for the property taken, but also cover the costs of relocation for any business or home which must move. Currently, local entities don't have this restriction and are only subject to this law if there are federal funds used for the project.

The second, and more substantial step, would be to withhold ANY federal economic development funds to localities which choose to take property for private commercial development. This measure would not make it illegal for entities to continue their practices, but would make them think twice by forgoing any federal funding for any project should they proceed. Under the other measures which have been introduced, local entities could use private or local funding when pursuing eminent domain of this type, however, under our bill they would have to think twice before pursuing this practice.

We think this bill strongly discourages governmental entities from moving forward with trading citizens dreams for taxes. The STOPP Act is the least we can do, a measure with teeth, a measure for average citizens, a bill to correct a far reaching decision with horrific consequences. I commend Chairman Pombo and Ranking Member Rahall for their interest in moving forward quickly on this important legislation. I also commend Chairman Pombo for his never-ending fight for the private property owners of our great nation. I would also like to thank my lead co-sponsor Rep. Herseth for her strong advocacy on behalf of those who may be adversely impacted by this decision. Last I would like to thank my colleagues from every end of the political and ideological spectrum who have come together to endorse and support this piece of legislation to protect the American property owner.

The CHAIRMAN. Well, thank you. I would like to at this time recognize Mr. Otter who, in his time, has been a Member of the House of Representatives; has worked tirelessly on property rights issues. And as a result of that, has taken a leadership role in the Western Caucus in heading up their private property rights protection efforts.

Mr. Otter, welcome to the Committee.

**STATEMENT OF THE HON. C.L. "BUTCH" OTTER, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO**

Mr. OTTER. Thank you very much, Mr. Chairman. It is my pleasure to be here. And though I no longer serve on this Committee, I certainly appreciate the accommodation that the Chairman and the Committee Members have made for me, and for my colleagues, to come and speak about this bill.

Let me also say that I really appreciate Mr. Bonilla and Ms. Herseth's leadership in this. It was, as they have already stated, probably one of the broadest-supported early on pieces of legislation that I have ever seen in my short time in the U.S. Congress.

"Nor shall private property be taken for public use without just compensation." Mr. Chairman, all of us here know those simple 12 words, phrased in the Fifth Amendment of the Constitution. We all know it was pointedly intended to limit the national government's power over people.

How, then, in a five-to-four majority decision in the United States Supreme Court on June 23, that such a straightforward phrase actually grants government nearly unfettered authority to strip citizens of their homes, their farms, their businesses, their private property?

I believe it ranks amongst history's most outrageous examples of constitutional revisionism.

In fact, we all need to remember the words of Ben Franklin as he exited the Freedom's Hall, or the Church in Philadelphia, when he was queried after they had completed their work on our system of government. He was asked by a citizen, "Mr. Franklin, what form of government have you given us?" And he said, "Madam, we have given you a republic, and it will fall to each and every generation to improve, protect, and defend it."

Well, I would say that I suspect that the Kelo decision is our generation's Boston Massacre. It probably took an affront to private property like this in order to collect together this group of citizens and this group of political leaders that now support it.

And so having said that, the immediate murmurs of criticism from a few people in response to the Court's ruling of Kelo v. New London has turned into a widespread public outcry of frustration, and even despair, as people realize the implications. No one is safe.

As Justice Sandra Day O'Connor put it succinctly in her sharply worded dissent, "The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

The leaders of New London, Connecticut, almost certainly would have failed if the land in question, I believe, had been the habitat of an endangered bug or a plant or an animal. Instead it was a neighborhood of working class people unwilling to give up their homes for a private development that the City determined would provide greater public benefit and greater public taxes.

They counted on the Constitution to protect them. And Mr. Chairman, the Court let them down. Each state constitution, Idaho's included, imposes restrictions on the power of eminent domain. However, each state constitution is required to fall within the essential principles that govern it as the subordinate, and

accountable to the individual citizens, and not the other way around. Put more simply, our constitutions are designed to ensure that government remains the servant, and not our master.

That is why the framers insisted on the clear wordings of “public use” in the Fifth Amendment. We all thought we understood what that meant. There was no disagreement or confusion. Now we find ourselves with a narrow majority of the highest Court in the land, willing to simply erase the rights of private property owners, the foundation of our freedom and prosperity, and the beacon of individual liberty that has drawn generations to pound the shores for citizenship of the United States.

It is unthinkable that the framers of the Constitution designed “to secure the blessings of liberty to ourselves and our prosperity” would intend that private property be subject to government confiscation, and confiscation it is. For how can just compensation be possible when government wields the power to define public use so broadly?

Mr. Bonilla’s bill, H.R. 3405, goes a long way toward addressing the problems created by the Kelo decision, creating economic disincentives for the taking of private property for the purpose of private economic development. I believe the Kelo decision woke America up to the fact that over time, our property rights have quietly been eroding, the same way a stream of water slowly erodes its banks. Fortunately, this erosion has not gone unnoticed by westerners or those who have been sent here to represent them.

Private property rights have long been held dear by families and landowners in the West, and for good reason. Their farms and ranches have been their livelihood, and part of the national heritage, since the frontier was closed to the west, and the West was settled.

Today many westerners not only have to fight for their economic survival, but have to worry whether or not the property will be around them, for them to pass on to their children and future generations. The Federal government owns more than half of all the land in the West, and almost two thirds of that in Idaho. And population in the region continues to grow.

As the Chairman has correctly noted, I am a Member of the Congressional Western Caucus, and we count amongst our core principles the necessity to protect and defend private property. It is the Caucus’s position that property rights are the foundation of a free society, that landowners must be justly compensated when their land is taken.

Immediately after the Kelo decision the Caucus asked me to chair the Private Property Rights Task Force. With the aid of many in the property rights community, we have created a comprehensive property rights package we call CPR-2, the Comprehensive Property Rights Reform Act. We believe this bill, in addition to H.R. 3405, will help breathe new life into property rights.

The Western Caucus Property Rights Bill will formalize the policy of the Federal government with respect to all private property that the government should protect, and exert eminent domain only when absolutely necessary. The bill will ensure that the property is taken, and the government will avoid or minimize the

extent of the taking, and provide just compensation for the loss of any value, at any level.

Mr. Chairman, I ask in closing that my entire statement be submitted for the record, and to the record. And once again, Mr. Chairman, I thank you and Ms. Herseth and Mr. Bonilla for your great leadership in this effort.

[The prepared statement of Mr. Otter follows:]

Statement of The Honorable C.L. "Butch" Otter, a Representative in Congress from the State of Idaho

Thank you, Mr. Chairman.

While I am no longer a member of the Committee, I appreciate you holding this hearing today and allowing me to testify. I also appreciate Mr. Bonilla's leadership on this issue and am pleased to join him as a co-sponsor of H.R. 3405 the STOPP Act.

"...nor shall private property be taken for public use without just compensation." Mr. Chairman, all of us here know that simple 12-word phrase in the Fifth Amendment to the Constitution. We all know it was pointedly intended to limit the new national government's power over the people.

How then, did a 5-4 majority of the United States Supreme Court rule on June 23 that such a straightforward phrase actually grants government nearly unfettered authority to strip citizens of their homes, farms and businesses?

I believe it ranks among history's most outrageous examples of constitutional revisionism.

The immediate murmurs of criticism from a few people in response to the court's ruling in *Kelo v. City of New London* has turned into a widespread public outcry of frustration and even despair as people realize the implications: No one is safe.

As Justice Sandra Day O'Connor put it succinctly in her sharply worded dissent, "The specter of condemnation hangs over all property, nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

The leaders of New London, Connecticut, almost certainly would have failed if the land in question had been the habitat of an endangered plant or animal. Instead, it was a neighborhood of working-class people unwilling to give up their homes for a private development that the city determined would provide a greater public benefit.

They counted on the Constitution to protect them, but the court let them down.

Each state constitution, including Idaho's, imposes restriction on the power of eminent domain. However, each state constitution is required to fall within the essential principle that government is subordinate and accountable to the individual citizen, not the other way around. Put more simply, our constitutions are designed to ensure that government remains the servant, not the master.

That's why the Framers insisted on the clear words "public use" in the Fifth Amendment. We all thought we understood what it means; there was no disagreement or confusion. Now we find ourselves with a narrow majority on the highest court in the land willing to simply erase the rights of private property owners, the foundation of our freedom and prosperity and the beacon of individual liberty that has drawn generations to our shores.

It is unthinkable that the Framers of a Constitution designed to "secure the blessings of liberty to ourselves and our posterity" would intend that private property be subject to government confiscation—and confiscation it is, for how can "just compensation" be possible when government wields the power to define "public use" so broadly?

Mr. Bonilla's bill, H.R. 3405, goes a long way toward addressing the problems created by the *Kelo* decision by creating economic disincentives for the taking of private property for the purpose of private economic development.

I believe the *Kelo* decision woke America up to the fact that over time, our property rights have quietly been eroding the same way a stream of water slowly but surely erodes its banks.

Fortunately, this erosion has not gone unnoticed by westerners or those they've sent here to represent them.

Private property rights have long been held dear by families and landowners in the West, and for good reason. Their farms and ranches have been their livelihood and part of our national heritage since the frontier was closed and the West was settled.

Today many westerners not only have to fight for their economic survival but also have to worry whether their property will be around for them to pass on to their children and future generations. The federal government owns more than half of all land in the West—almost two-thirds in Idaho—and populations in the region continue to grow.

I am a member of the Congressional Western Caucus, and we count among our core principles the necessity to protect private property. It is the Caucus' position that property rights are the foundation of a free society; that landowners MUST be justly compensated when their land is taken or when regulations deprive them of the use of their property.

Immediately after the Kelo decision the Caucus asked me to chair the Property Rights Task Force. With the aid of many in the property rights community, we have created a comprehensive property rights package we call CPR2, the Comprehensive Property Rights Reform Act. We believe this bill, in addition to H.R. 3405, will help breathe life into property rights reform.

The Western Caucus property rights bill will formalize the policy of the federal government with respect to all private property, that the government should protect private property and exert eminent domain only when absolutely necessary. The bill will ensure that when property is taken, the government will avoid or minimize the extent of the taking and provide just compensation for loss of value at any level.

The bill also includes creation of a property rights ombudsman, bars use of eminent domain for economic development, ensures direct access to federal courts for takings claims, and provides several mechanisms for protecting what little private property remains in the West.

The property rights issue is not a class issue. It's not a partisan issue. It's an issue of the most fundamental importance to America's future, and one on which none of us can afford to be what Thomas Paine called "sunshine patriots."

Thank you again Mr. Chairman for holding this hearing, and I look forward to working with the committee on this important issue.

The CHAIRMAN. Thank you. Mr. Bonilla, I know that you have a tight schedule this morning. But I did want to ask you, as the primary author of the legislation, was your intention to use what powers Congress has to stop cities or counties or municipalities from using eminent domain to take property from private property owners and sell it to another private owner? That was the underlying intention of the legislation, was it not?

Mr. BONILLA. Yes, Mr. Chairman. Again, using the power of the purse, which Congress does control, we feel that this would be an airtight case against any community that receives any type of Federal funding, a great disincentive for them to undertake any kind of taking for private gain.

The CHAIRMAN. As we move forward, both you and Ms. Herseth have talked about other legislation that has been introduced. As you move forward with this effort, do you not believe that we need to make sure that we restrict that funding to the point where it is a disincentive?

Mr. OTTER. Yes, Mr. Chairman. And again, we believe that this bill does that. And we are delighted that, as other legislation is being crafted as we speak, to be the legislation that moves through Congress, that perhaps all or most of the points in our bill will be incorporated.

The CHAIRMAN. Thank you. Mr. Otter, just briefly, one of the issues that has arisen is, over the years that we have been involved in this battle over private property rights, it always predominantly was an issue of western farmers and ranchers and their land being taken.

Now, with the Kelo decision, we see suburban and urban America being threatened. Do you believe that there is any difference in protecting private property, in private property rights, based upon

where the land is located, or the size of the property? It seems like in some of the bills that have been introduced they somehow try to differentiate between someone's farm and someone's home, as if there is a difference in the constitutional protection for those properties.

Mr. OTTER. Thank you very much, Mr. Chairman. I believe there's no difference between dirt in Idaho or dirt in New London, Connecticut, or anyplace else.

The dirt and the private property that we own is actually an extension of our constitutional rights. And our Constitution will not survive in a nation that doesn't recognize and hold sacred the concept of private property. Our Constitution just was not built in order for a government that doesn't believe in private property and holds that sacred, that it is going to survive.

And so sometimes in our enthusiasm, we say well, if we are going to take the land for this purpose, it is OK. This public use, or public benefit, it is OK.

We in the West, for many reasons, mostly because of absentee management by the Federal government, are constantly affected by decisions on our private property that is made relative to the public property. In other words, whether it is noxious weed eradication that the Federal government fails to keep up on its BLM, or Forest Service, or parks lands, or whatever, those seeds don't stop at the boundary. When they start blowing around, they explode into private property. In fact, they even blow to the 1,300,000 acres in Idaho that we hold in trust in Idaho as state lands for our education system.

And we have to spend a lot of money, whether it is fighting noxious and invasive weeds that become a fire hazard, or become some kind of an infective hazard to the value of that land, we constantly have to fight that.

But we have gotten on a slippery slope. And we establish a national policy of, say, clean water. I see nothing wrong with that. I think a national policy of clean water is good, is healthy. No different, though, than a national policy of good highway infrastructure. And if we take a person's land to build a highway and we think nothing of it, and we pay them for that land because we need the highway.

But if a national policy of clean water is also essential, then I think we need to pay those people for the land that we take from them, whether it is in the wetlands, under the Wetlands Provision, or the Endangered Species Act.

The CHAIRMAN. Well, thank you. I thank both of you for your testimony.

Ms. Herseth, do you have any questions? Mr. Gibbons?

Mr. GIBBONS. Thank you very much, Mr. Chairman. And to our colleagues who have come here today and presented us with this bill, congratulations to you.

I think the most important thing that we can do today in this hearing is to set a legislative record that will be reviewed by a court later on in their determinations of how to apply eminent domain, and what the legislative intent was at the time we passed it.

So what I would like to do is just have a very frank discussion with you in helping build that record, if I may. And as we know, the Kelo decision expanded the definition of public purpose. It expanded the definition of public purpose outside of the traditional definition, which included public uses of roads, parks, reservoirs, schools, and public buildings. Those were the traditional uses. And Kelo has seemed to take that public purpose, and expand that definition to the increase in the taxable value of the land as a public purpose, something that was an expansion, a legislative expansion, and never intended by Congress, I am sure, in the original, or the framers in the original definition of what could be taken under eminent domain.

My question to you involves the intent of this legislation to limit eminent domain to non-economic development purposes, is it the intent of the legislation to limit eminent domain from a combination of truly public purposes under historic definitions, and eminent—or, excuse me—economic development, a combination of the two. How do you see the application of this bill, when there is a dual or multiple purpose of the eminent domain?

Mr. BONILLA. Well, first of all, this bill in no way threatens traditional constitutionally based practices of eminent domain of airports, transportation systems, hospitals, things that are truly for the public good.

If there is one that a community feels that might have a combination of an economic advantage, it is going to be their job to show that this is a public interest, not a private interest.

Mr. GIBBONS. Mr. Bonilla, my intent is not here to question or to criticize the bill or the legislation at all. What I am trying to do is establish a record.

So if the Court, on review of an eminent domain case that was principally decided by a community or government entity on the purpose of public use, whether it is a road, hospital, school, public building, plus either an ancillary or an intended side use of increasing the economic development in an area, can your bill intercede in that and stop the eminent domain process?

Mr. BONILLA. I would think that once this bill is enacted, that communities would themselves have the burden of showing that this is, that a taking would be for public use. And if it was gray enough, or there was an indication that perhaps they were trying to pull an end around and say this is a public use taking, but they really had an economic motivation, that we would be able to see through that. But it is going to be their responsibility to differentiate.

Certainly in every law you pass, you are going to face some situations that might be a little gray. But historically, we have not seen situations like that. They have been very clearly delineated for the most part in this country, and we have not had a problem until the Kelo decision.

Mr. GIBBONS. So we can take that the Court, from this day forward, will look at our record here today in Congress, and review the decisions based upon whether or not the public use is the predominant eminent domain clause under which the taking occurred. So that there has to be a predominance of evidence showing that the taking was under eminent domain for public purpose, rather

than eminent domain for economic purpose, it can make that decision then based on the evidence before it. But a combination would not be stopped.

I just want to make sure that we are clear on the record of how a court should interpret this law going forward from today.

Mr. BONILLA. This is a very good question. I am not an attorney, so I probably do not have the expertise in the legalities that differentiate. But the Judiciary Committee is also playing a great role in this, and that is a question that we will take as we move this bill forward.

Mr. GIBBONS. Good. Because I just want to make sure that we set it straight. And Mr. Chairman, excuse my indulgence of going over the time.

Mr. OTTER. Mr. Chairman, if I may respond to my colleague. I can tell you this. That if the Court reads this record in manifesting their decision on a future case, that they look at the reason Butch Otter is going to vote for this bill, the reason Butch Otter supports this bill.

The Constitution is pretty explicit on the purposes for which the Federal government can own land. And they are delineated in its posts and its roads and such other buildings necessary for the convenience of government. That does not include apartment houses, and it does not include strip malls, and it does not include centers for entertainment.

And so it is my hope that once again, the Bonilla-Herseth legislation will remind the Federal courts, the courts at all levels, that they should restrict themselves to the purposes for which the design of eminent domain was to be used, and for the sole purposes that the government should own land.

Mr. GIBBONS. Mr. Otter, you do know that most government agencies are very intelligent; they always find ways around legislation to accomplish the intent or the purpose of which they started out.

So I hope that at some point we can tell them that you must separate economic development from public purpose.

Mr. OTTER. I think the best way that we could have told them that, Mr. Gibbons—and I hope that the lack of attention and the interest in this subject is not manifested by the amount of Members for the Committee in this room. I hope they already agree with us, and that is why they are not here.

But I would say the best way that we could send a signal to any future court is to have an overwhelming majority vote in favor of this legislation.

Mr. GIBBONS. Well, in addition to what the Court will look at is the words that are spoken here at this Committee, the intention of the legislation in terms of its intended goal, and how that is to be interpreted by the Court.

I think it is very clear it is incumbent upon us to make sure that our record establishes a clear intent that this legislation is to prohibit eminent domain for economic purposes between private parties. In other words, taking from one private party for an economic development purpose, to increase the tax base, or whatever other non-public purpose, and transfer it to another private property.

Mr. BONILLA. Mr. Gibbons, may I make a further comment?

Mr. GIBBONS. Well, it would be with the concurrence of the Chairman, who might not—

The CHAIRMAN. No, absolutely.

Mr. BONILLA. We would think that reality would set in when this bill becomes law, and that any local government out there—we are creating a very hard road for any local government to go down if they have an idea of taking property for private gain.

So I would think that any government entity out there with half a brain would not want to go down this road. Because we are going to make it real hard. If they want to go to court for 10 years and challenge it, you know, local governments usually don't have that kind of money or time. So this is, again, an effort to create the most difficult route for any local government to take if they have any idea whatsoever of taking property for private gain.

Mr. GIBBONS. Well, I just want to tell you I am completely in support of the legislation. I thank you for your leadership, for everyone who has brought this bill forward. I want to thank the Committee and the Chairman for allowing us to have this dialog. And I look forward to the vote on the Floor when I can vote yes to reverse the Kelo decision.

Ms. HERSETH. Mr. Chairman.

The CHAIRMAN. Ms. Herseeth.

Ms. HERSETH. If I might just briefly supplement the comments of my colleagues in response to Mr. Gibbons' question.

I think it is very much the intent as we work to draft the language to redraft the language, to tighten it up, so that we would not be in a position to have a loophole big enough to drive a truck through with the creativity of local officials who want to get around this somehow. And that is why we did not start making decisions in the drafting of the language for ancillary purposes, or what may be an indirect use or private transfer.

And we talked about if you have a public building, and one floor then is rented out—we did not want to make those types of distinctions, because we wanted to drive a hard line that if there is any evidence that if there is going to be an economic purpose and a private-to-private transfer of any kind after utilizing eminent domain for a public purpose, the funding would be cutoff. Because we don't want—I mean, we are trying to cutoff that type of creativity where they always seem sort of one step ahead in what they are trying to do to circumvent some of the restrictions that we want to put on the power of the purse, so to speak.

So that was the intent. And for purposes of the record, we think that we have drawn it in such a way that with the private right of action, that any individual that may be affected who believes and can show evidence—and I think that with public meetings at the local level, with the involvement of citizens in these types of decisions, when they can anticipate a certain local unit of government going down a certain road to take a certain action, that they, as Chairman Bonilla explained, can, under this legislation, and it is incumbent upon them to exercise that right to bring a private right of action, to demonstrate that while this local entity may be attempting to take land under eminent domain under a traditional use of eminent domain, that if there is a combination of economic purpose in there, that they can demonstrate that with the

evidence. And it is incumbent upon the District Court Judge to review that evidence, and if there is any indication of an economic development purpose, that it is ruled impermissible, under this statute. And that they can either cure it by giving the land back, or they forgo their Federal funding as specified in the statute.

So I think that in response to your question, which is a very good one, that the intent of the legislation is to not allow any kind of combination, whether it is a 60/40, if you can put a percentage on it, or a 95/5 percentage of public use versus economic use.

Mr. GIBBONS. Well, let me say that that is exactly what the record ought to reflect. And that is why it is great to have a conversation and a discussion on this matter, so that when they look back at what is the intent of Congress when we pass this legislation, that it is clear to them without a doubt that we have fired a rifle bullet at this decision. And we are not just clipping away at the edges, but we are killing it dead.

There is no economic development other than for eminent domain, for purposes of transfer of private property from one individual to another.

The CHAIRMAN. All right. I thank our panel for their testimony, and I appreciate my colleagues for trying to set on the record what Congressional intent is.

I do want to stress, before I dismiss this panel, that there is no difference in the constitutional protection of private property based upon the size or the location or the use of private property. Just because in this particular case we are talking about people who lost their homes, it does not mean that it is any difference in terms of importance or constitutional protection than if they were to go after somebody's ranch or somebody's home and take their property.

When you start differentiating in the law between the size or the location of a piece of property, you begin to take away the property rights of somebody. And once you take away the property rights of anyone, we all lose them. And it is extremely important that as we move forward, that there is no differentiation in the size of the property or the location of the property, or the use of that property. We need to make sure that the constitutional rights of private property owners are protected, no matter who or where they are.

So thank you very much. I am going to allow this panel to go. I appreciate you both taking so much time here this morning to spend with us, and to help set the record straight and present your legislation to us. Thank you.

We call up our second panel. Ms. Barbara Wally, Attorney, Defenders of Property Rights; Mr. Bert Gall, Staff Attorney, Institute of Justice; Mr. Earl Hance, President of the Maryland Farm Bureau and a member of the Board of Directors of the American Farm Bureau; and Mr. Mario Arroyo, Co-Owner of Arroyo's Cafe in Stockton. You can join us at the witness table.

[Pause.]

The CHAIRMAN. Welcome to the Committee. Your entire written statements will be included in the record. I would ask that your oral testimony be limited to the five minutes that is customary on the Committee, but your entire written testimony will be included in the record.

Ms. Wally, we are going to begin with you.

**STATEMENT OF BARBARA WALLY, ATTORNEY,
DEFENDERS OF PROPERTY RIGHTS**

Ms. WALLY. Good morning. I am delighted to be testifying before the Committee today in support of the STOPP Act. On behalf of the Defenders of Property Rights and all of its membership, I would particularly like to thank Chairman Pombo and his staff for their strong and bold leadership on proposing legislation that effectively balances the need for protection of endangered species with the need for protection of constitutionally guaranteed rights and property.

The need for protection of constitutionally guaranteed rights and property is underscored by last term's trilogy of Supreme Court decisions: *Kelo v. New London*, *Lingle v. Chevron*, and *San Remo v. City and County of San Francisco*. In light of these decisions, I would like to impress upon the Committee the importance of Congress providing greater guidance to litigants, to government agencies, and to lower courts.

The Supreme Court confused the issues by not only failing to provide bright-line rules, but also by moderating the existing rules. Thus, it is imperative that Congress act to provide greater certainty in order to protect these important constitutional rights.

Kelo, *Lingle*, and *San Remo* are inconsistent internally, inconsistent with one another, and inconsistent with prior Supreme Court jurisprudence and the Constitution.

In *Kelo*, the Court examined what a public purpose is by looking into the legislative record, and weeding through the public findings in order to arrive at a definition of public use. In the end, the Court deferred to the Legislature's decision, but it only deferred to that decision after it looked into the legislative record.

Also, the Court indicated that public use really means public purpose. But redefining public use to mean public purpose is at odds with the plain language of the Constitution, which states that private property shall not be taken for public use without just compensation.

In *Lingle*, the Court struck down a takings test, holding that whether a government regulation substantially advances a legitimate state interest is not a valid takings inquiry. But this test was adopted by the Supreme Court in 1980, and affirmed in many cases subsequent to it, most notably *Nolan v. California Coastal Commission* in 1987. In striking down the substantially advances test, however, the Court announced that the *Nolan* decision was still good law, leaving property owners, decisionmakers, and local courts utterly perplexed as to how to apply the *Lingle* decision.

The *Nolan* test allows government to impose permit conditions if those conditions substantially advance legitimate state interests. And the Court also suggested that no court should ever decide whether regulations affecting property rights are effective or not.

Finally, in *San Remo*, the Court refused to look at local legislation, holding that zoning and land use regulations are a local issue for state courts, and not Federal courts. And therefore, the Court suggested that there are some courts equipped to analyze regulations affecting property rights.

In light of these decisions, it is more important than ever that Congress provide greater clarification and direction to property

owners, to government agencies, and to the lower courts in order to promote clear, transparent, and predictable rules.

Congress will take important steps toward providing these rules by passing the STOPP Act.

I would like to extend my thanks to the Chairman and to the Committee for this opportunity to testify. Thank you.

[The prepared statement of the Defenders of Property Rights follows:]

**Statement of Nancie Marzulla, President,
Defenders of Property Rights**

Mr. Chairman and Members of the Committee:

I am pleased to be here today on behalf of Defenders of Property Rights, the only national public interest legal foundation devoted exclusively to protecting private property rights. Through a program of litigation, education and legislative support, Defenders seeks to realize the promise of the Fifth Amendment of the U.S. Constitution, that private property shall not be "taken for public use, without just compensation." Defenders, which is based in Washington, D.C., has a large national membership comprised of property owners, users and beneficiaries of the rights protected by the Constitution and traditional property law. Defenders participates in litigation when it is in the public interest and when the property rights of its members are affected, and has also devoted significant resources to analyzing legislative proposals concerning property rights at both the state and federal level.

Today, I am here to comment on H.R. 3405, Strengthening the Ownership of Private Property Act of 2005 (STOPP). By prohibiting federal financial assistance under any federal economic development program to any State, State agency, or local government, that uses its eminent domain power for private commercial development or fails to provide relocation assistance for persons displaced by use of eminent domain for economic development, this bill seeks to prevent the taking of private property for public use without just compensation, as required by the Fifth Amendment to the United States Constitution.

I. The Constitution Imposes a Duty on Government to Protect Private Property Rights Because Property Rights are an Essential Element of a Free Society.

As reflected in various provisions in the Constitution, the Founding Fathers clearly recognized the need for vigorously protected property rights. They also understood the vital relationship between private property rights, individual rights and economic liberty. Property rights is the "line drawn in the sand" protecting against tyranny of the majority over the rights of the minority.

The Founding Fathers, in drafting the Constitution, drew upon classical notions of legal rights and individual liberty which recognize the importance of property ownership in a governmental system where individual liberty is paramount. Concurrently, the constitutional framers drew upon their own experience as colonists of an oppressive monarch, whose unlimited powers allowed him to deprive his subjects of their "life, liberty, and property" (subsequently revised by Thomas Jefferson to substitute "the pursuit of happiness" for "property").

To the framers of the Constitution, the protection of individual liberty was essential. The fundamental liberties guaranteed by the Bill of Rights include freedom of speech and religion; freedom of press and assembly; the right to bear arms; the right to trial by jury and cross examination of accusing witnesses; and freedom from cruel or unusual punishment. Recognizing that a government could easily abuse these civil rights if a citizen's property and livelihood were not guaranteed, the United States Constitution also imposes a duty on government to protect private property rights.

Thus, within the Bill of Rights, numerous provisions directly or indirectly protect private property rights. The Fourth Amendment guarantees that people are to be "secure in their persons, houses, papers, and effects...." The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." In addition to the Bill of Rights provisions, the Fourteenth Amendment echoes the Due Process Clause of the Fifth Amendment, stating that no "State shall deprive any person of life, liberty or property without due process of law...." Indirectly the Contracts Clause of the Constitution also protects property by forbidding any

state from passing any “law impairing the Obligation of Contracts.” U.S. Const. art. 1, § 10.

The Constitution places such strong emphasis on protecting private property rights because the right to own and use property was historically understood to be critical to the maintenance of a free society. The ability to use, enjoy and exclusively possess the fruits of one’s own labor is the basis for a society in which individuals are free from oppression. Indeed, some have argued that there can be no true freedom for anyone if people are dependent upon the state for food, shelter, and other basic needs. Understandably, where the fruits of citizen’s labor are owned by the state and not individuals, nothing is safe from being taken by a majority or a tyrant. Ultimately, as government dependants, these individuals are powerless to oppose any infringement on their rights due to absolute government control over the fruits of their labor.

Accordingly, it is a founding principle of our nation that private land may not be taken for public use (unless it be purchased from the owner). This basic principle—that the government must lawfully acquire private land rather than merely seize it—is predicated upon fundamental notions of fairness. As the Supreme Court stated in *Armstrong v. United States*, “[t]he Fifth Amendment...was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” 364 U.S. 40, 49 (1960).

The Founding Fathers understood the vital relationship between private property rights, individual rights, and economic liberty. However, the Founding Fathers could never have envisioned the growth of government that has occurred of late years. Never before have government regulations threatened to destroy private property rights on so large a scale and in so many different contexts as they do today. In just two short decades, the United States has developed from scratch the most extensive governmental regulatory programs in history. Environmental regulations have become an elaborate web of intricate laws and regulations covering every conceivable aspect of property use, yet very few recognize the fundamental importance of property rights to our Constitution and our system of government under law.

II. The Supreme Court’s October 2004 Term

The Supreme Court’s October 2004 term provided an excellent opportunity for the Court to straighten out the law with regard to the meaning of the Fifth Amendment’s “public use” requirement, the application of the “substantially advances” test, and the ability of plaintiffs to get their just compensation cases before the federal courts. Instead, in *Kelo v. New London*, 125 S. Ct. 2655 (2005), *Chevron v. Lingle*, 125 S. Ct. 2074 (2005), and *San Remo Hotel v. San Francisco*, 125 S. Ct. 2491 (2005), the Court offered a series of disappointing decisions that did nothing to further an individual’s fundamental property rights. Moreover, these decisions were fraught with internal inconsistencies, as well as inconsistencies with previous just compensation decisions. Let me briefly outline the Court’s decisions in these three just compensation cases:

Kelo v. New London

The *Kelo* case is certainly the most talked about of last year’s three Supreme Court takings cases. In *Kelo*, private property owners had their property taken from them and turned over to a private development corporation to be redeveloped for private use. The question before the Court was whether taking land from one private landowner and giving it to another, violated the public use requirement of the Just Compensation Clause, where that taking was part of an economic redevelopment plan. The Court upheld the taking.

In upholding the taking, the Court rejected a bright-line rule that would have clearly prevented the state from taking private property from A and giving it to B, instead favoring a test that asks whether the development plan serves a “public purpose.” The dissent, and judging from the public reaction, much of the public, rejected the majority’s interpretation. The dissent reasoned that after *Kelo*, “[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.” 125 S. Ct. at 2671. According to the dissent, the majority had “effectively...delete[d] the words ‘for public use’ from the Takings Clause of the Fifth Amendment.” *Id.*

Chevron v. Lingle

In *Chevron v. Lingle*, the lower courts had applied the “substantially advances” formula set forth in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to determine whether a Hawaii law, which limits the rent that oil companies may charge dealers

who lease service stations owned by the companies, effects a taking. The lower courts held that the rent cap effects an uncompensated taking of private property in violation of the Fifth and Fourteenth Amendments because it does not substantially advance Hawaii's asserted interest in controlling retail gasoline prices. The Supreme Court reversed the lower courts straight forward application of the "substantially advances" test, holding that the "substantially advances" test was a test of due process and has no place in the Court's takings jurisprudence.

The Court reasoned that "[i]nstead of addressing a challenged regulation's effect on private property, the 'substantially advances' inquiry probes the regulation's underlying validity." 125 S. Ct. at 2084. The Just Compensation Clause, according to the Court, "does not bar government from interfering with property rights, but rather requires compensation 'in the event of otherwise proper interference amounting to a taking.'" *Id.*

San Remo Hotel v. San Francisco

The Court, in *San Remo Hotel v. San Francisco*, dealt with a question that involved the ability of property owners, who have had their property taken by state or local governments, to get those claims into federal courts. Under the standards set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), a just compensation claim against a state or local government cannot be brought in federal court until after the claimant seeks just compensation in state court. However, in *San Remo*, when the claimants went to state court, the court addressed the claimants federal constitutional claims; thus preventing later consideration of the case on its merits in federal court. In other words, the claimants could not originally bring their case in federal court because they had not been denied just compensation in state court, and once they were denied just compensation in state court they could not bring a new case in federal court because their case had already been decided in state court.

In a concurrence, the late Chief Justice Rehnquist, joined by three of his fellow justices, wrote that he believed, echoing the position taken by *Defenders of Property Rights* as amicus curiae, that *Williamson County's* requirement that once a government entity has reached a final decision with respect to a claimant's property that claimant must seek redress first in state court, was incorrectly decided. However, without the needed fifth vote, property owners will continue to be denied a federal forum in which to bring an original action.

III. Legislative reform is essential to fully protect all Property Rights and to realize the purpose of the Fifth Amendment.

From the perspective of those who cherish private property rights, the Supreme Court's last term was disappointing. In the three just compensation cases that came before the Court, the Court effectively deleted the words "for public use" from the Just Compensation Clause, eliminated one of tests that limited the ability of the government from taking private property, and declined an invitation to extend a federal forum to property owners who had their property taken by a state government. On the bright side, however, the Supreme Court is not the only arbiter of the Constitution under our system of government. There is a role for Congress as well. The Strengthening the Ownership of Private Property Act of 2005 is an excellent vehicle for Congress to step in and re-invigorate a fundamental right the Supreme Court has weakened through its decisions of the last term.

Although it is often stated that it is the role of the courts to say what the law is, the Members of Congress also take an oath to support, defend, and bear true faith and allegiance to the Constitution of the United States. Here, through the use of a power specifically enumerated to Congress in the Spending Clause, Congress has an opportunity to fulfill its oath to the Constitution and reaffirm that document's fundamental protections for private property. When the courts fail, it is up to Congress to make the federal, state, and local governments give the rights of private property owners the respect and deference that the Constitution requires.

IV. Conclusion

The proposed bill, H.R. 3405, goes along way in attempting to restore the damage done to the text of the Just Compensation Clause by the Supreme Court's recent ruling in *Kelo*. The reform embodied in H.R. 3405 will attempt to ensure that State and local governments do not use their eminent domain powers for private commercial development and, that when eminent domain power is used, those governments will provide relocation assistance for property owners displaced for economic development.

I would be pleased to answer any questions you may have concerning my testimony.

The CHAIRMAN. Thank you. Mr. Gall.

**STATEMENT OF BERT GALL, ATTORNEY,
INSTITUTE FOR JUSTICE, WASHINGTON, D.C.**

Mr. GALL. Thank you, Mr. Chairman and Members of the Committee for this opportunity to testify about the abuse of eminent domain, which is an issue that has obviously captured the attention of the American people since the Supreme Court handed down its now very infamous decision in *Kelo v. City of New London*.

The Institute for Justice represented the homeowners in the *Kelo* case, and we continue to fight for them so that they can stay in their home, because they are true American heroes who are taking a stand against a very longstanding problem, but one that has really come to light in the wake of *Kelo*.

In that case, the Supreme Court declared that cities and towns can take a person's home or business or other property, and hand it over to another person if they think that the other person can make more money off the land. That is the standard that the Supreme Court established in *Kelo*, a very weak standard that has essentially eviscerated the protections that the Fifth Amendment provides to home and business owners. The public use clause is essentially no more after *Kelo*.

As Justice O'Connor wrote in her powerful dissent before members of the Court, "The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing a Motel 6 with a Ritz-Carlton, any home with a shopping center, and any farm for a factory."

Now, understandably after the decision, Americans of all backgrounds and political affiliations expressed their outrage that the Court abandoned its primary responsibility of protecting them from the government, government's abuse of power. Particularly in the important area of protecting homes or businesses. I mean, the *Kelo* decision literally touched home.

Thankfully, this body, the Congress, as well as state legislators, have heard the call, and members of both sides of the aisle are working together to craft legislation that ensures that cities that abuse eminent domain will not be rewarded with the receipt of Federal economic development funds.

Now, the need for eminent domain reform is very real. In fact, it was really needed even before the *Kelo* decision took place. Over a five-year period, the Institute for Justice documented over 10,000 examples where property was either condemned or threatened to be condemned for the benefit of private parties. And now that the *Kelo* decision has come down, the gloves really seem to be off. In fact, just hours after the *Kelo* decision was issued, many cities began condemnation actions against property owners to transfer their property to other people to make more money off the land. The Court has given the green light to abuse in cities, and developers are putting the pedal to the metal.

It is useful to discuss just briefly how we have arrived at this state of affairs in the law. It did start a little bit before *Kelo* in the Supreme Court's decision in 1954, in *Berman v. Parker*. That is where you saw the Court starting to change the words "public use" in the Constitution to "public purpose." And it was at that point

that cities and communities took advantage of that changing in the wording of the Constitution to move away from the traditional conception of public use.

You know, the founding fathers early on referred to, and the Supreme Court early on referred to, eminent domain as the despotic power, because they understood that taking away someone's home, their business, their property, was one of the most powerful, one of the worst things that a government could do to its citizens.

With the Berman case, cities using the words "public purpose" and "public welfare" began using things such as urban redevelopment laws to take perfectly nice properties, or properties that could be remediated by the owner, and then transfer those over to other owners for private development. And of course, that has now culminated in the Kelo decision, where once again the standard is if you think you can make more money off of someone else's property, we will use eminent domain and transfer it to you.

Now, unfortunately, Federal money is often used to fuel this abuse of eminent domain. In fact, the Kelo case is an example of just that. In my written testimony I have listed examples where Federal money has certainly been involved.

The legislation that you are considering today, along with other legislation that is also before Congress, appropriately uses Congress's power under the spending clause to deny economic development funds to those cities that abuse their eminent domain powers.

The abuse of eminent domain uproots families. It destroys small businesses, and it tears apart communities. The Federal government should not be in the business of funding that abuse. And that is why I commend all of you, and Congressman Bonilla and other who worked on this and other legislation, for bringing it before Congress, and taking real steps to make sure that the Kelo decision will eventually, we hope, be consigned to the dustbin of history.

Thank you very much for the opportunity to testify.

[The prepared statement of Mr. Gall follows:]

Statement of Bert Gall, Attorney, Institute for Justice

Thank you for the opportunity to testify regarding eminent domain abuse, an issue that's finally getting significant national attention as a result of the U.S. Supreme Court's dreadful decision in *Kelo v. City of New London*. This committee and the sponsors of H.R. 3405, which this committee is currently considering, are to be commended for taking action to end this misuse of government power.

My name is Bert Gall, and I am an attorney at the Institute for Justice, a non-profit public interest law firm in Washington D.C. that represents people whose rights are being violated by government. One of the main areas in which we litigate is property rights, particularly in cases where homes or small businesses are taken by government through the power of eminent domain and transferred to another private party. I have represented property owners across the country fighting eminent domain for private use, and the Institute also represents the homeowners in the *Kelo v. City of New London* case, in which the U.S. Supreme Court decided that eminent domain could be used to transfer property to a private developer simply to generate higher taxes, as long as the project is pursuant to a plan. We have also published a report about the use of eminent domain for private development throughout the United States (available at www.castlecoalition.org/report).

In the *Kelo* decision, a narrow majority of the Court decided that, under the U.S. Constitution, property could indeed be taken for another use that would generate more taxes and more jobs, as long as the project was pursuant to a development plan. The *Kelo* case was the final signal that the U.S. Constitution provides no protection for the private property rights of Americans. Indeed, the Court ruled that it's okay to use the power of eminent domain when there's the mere possibility that

something else could make more money than the homes that currently occupy the land. It's no wonder, then, that the decision caused Justice O'Connor to remark in her dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

In response to the decision, there has been an outpouring of public outcry against this closely divided decision. Overwhelming majorities in every major poll taken after the Kelo decision have condemned the result. Several bills have been introduced in both the House and Senate, with significant bipartisan support, including H.R. 3405, which this committee is considering now.

The use of eminent domain for private development has become a nationwide problem, and the Court's decision is already encouraging further abuse

Eminent domain, called the "despotic power" in the early days of this country, is the power to kick citizens out of their homes and small businesses. Because the Founders were conscious of the possibility of abuse, the Fifth Amendment provides a very simple restriction: "[N]or shall private property be taken for public use without just compensation."

Historically, with very few limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Over the past 50 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores. The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain. This "solution," which has been a dismal failure, was given ultimate approval by the Supreme Court in *Berman v. Parker*. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Constitution and government already possessed the power to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened a Pandora's box, and now properties are routinely taken pursuant to redevelopment statutes when there's absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

The use of eminent domain for private development has become widespread. We documented more than 10,000 properties either taken or threatened with condemnation for private development in the five-year period between 1998 through 2002. Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. In Connecticut, the only state that keeps separate track of redevelopment condemnations, we found 31, while the true number was 543. Now that the Supreme Court has actually sanctioned this abuse in *Kelo*, the floodgates to further abuse have been thrown open. Home and business owners have every reason to be very, very worried.

Since the *Kelo* decision, local governments have become further emboldened to take property for private development. For example:

- Freeport, TX. Hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an \$8 million private boat marina).
- Sunset Hills, MO. On July 12, less than three weeks after the *Kelo* ruling, Sunset Hills officials voted to allow the condemnation of 85 homes and small businesses for a shopping center and office complex.
- Oakland, CA. A week after the Supreme Court's ruling, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family has owned since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the City, "We thought we'd win, but the Supreme Court took away my last chance."
- Ridgefield, CT. The city of Ridgefield is proceeding with a plan to take 154 acres of vacant land through eminent domain. The property owner plans to build apartments on the land, but the city has decided it prefers corporate office space. The case is currently before a federal court, where the property owner has asked for an injunction to halt the eminent domain proceedings. Ridgefield officials directly cite the *Kelo* decision in support of their actions.

Courts are already using the decision to reject challenges by owners to the taking of their property for other private parties. On July 26, 2005, a court in Missouri relied on *Kelo* in reluctantly upholding the taking of a home for a shopping mall.

As the judge commented, "The United States Supreme Court has denied the Alamo reinforcements." On August 19, 2005, a court in Florida, with no reluctance, relied on *Kelo* in upholding the condemnation of several boardwalk businesses for newer, more expensive boardwalk development.

Federal funds currently support eminent domain for private use

Federal agencies of course continue to take property for public uses, like military installations, federal parks, and federal buildings, and that is legitimate under the public use requirement of the Fifth Amendment. The agencies themselves generally do not take property and transfer it to private parties. However, many projects using eminent domain for economic development receive some federal funding. Thus, federal money does currently support the use of eminent domain for private commercial development. A few recent examples include:

- New London, CT. This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes are being taken for a private development project that is planned to include a hotel, upscale condominiums, and office space. The project received \$2 million in funds from the federal Economic Development Authority.
- St. Louis, MO. In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corp. demolished six square blocks of buildings, including approximately 200 units of housing, including some run by local non-profits. The older housing will be replaced by luxury housing. The project received at least \$3 million in HUD funds, and may have received another \$3 million in block grant funds as well.
- New Cassel, NY. St. Luke's Pentecostal Church had been saving for more than a decade to purchase property and move out of the rented basement where it holds services. It bought a piece of property to build a permanent home for the congregation. The property was condemned by the North Hempstead Community Development Agency, which administers funding from Housing and Urban Development, for the purpose of private retail development. As of 2005, nothing has been built on the property, and St. Luke's is still operating out of a rented basement.
- Toledo, OH. In 1999, Toledo condemned 83 homes and 16 businesses to make room for expansion of a DaimlerChrysler Jeep manufacturing plant. Even though the homes were well maintained, Toledo declared the area to be blighted. A \$28.8 million loan from HUD was secured to pay for some part of the project. The plant ultimately employed far fewer people than the number Toledo expected.
- Ardmore, PA. The Ardmore Transit Center Project has some actual transportation purposes. However, Lower Merion Township officials are also planning to remove several historic local businesses, many with apartments on the upper floors so that it can be replaced with mall stores and upscale apartments. The project receives \$6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. This is an ongoing project in 2005.

Congress can and should take steps to ensure that federal funds do not support the abuse of eminent domain

The *Kelo* decision cries out for Congressional action. Even Justice Stevens, the author of the opinion, stated in a recent speech that he believes eminent domain for economic development is bad policy and hopes that the country would find a political solution. Congress, this committee, and the sponsors of H.R. 3405 are all to be commended for their efforts to provide protections that the Court has denied.

Congress has the power to deny federal funding to projects that use eminent domain for private commercial development and to deny federal economic development funding to government entities that use eminent domain in this way.

Congress may restrict federal funding under the Spending Clause. The Supreme Court has laid out the test for any conditions that Congress places on the receipt of federal money in *South Dakota v. Dole*. The most important requirements are that there be a relationship between the federal interest and the funded program and that Congress be clear about the conditions under which federal funds will be restricted. The conditions laid out in H.R. 3405 are well within the bounds that courts have articulated regarding the relationship of the funding restrictions to the federal interest. The purpose of the federal funds is to aid states and cities in various development projects. If Congress chooses to only fund projects or agencies that conduct development without using eminent domain to transfer property to private developers, it may certainly do so.

H.R. 3405 takes a good approach to curbing the abuse of eminent domain nationwide

H.R. 3405 achieves a vitally important goal. Americans throughout the country have expressed their dismay at the Kelo ruling, and this bill would provide desperately needed reform. First and foremost, it states in no uncertain terms that state and local governments will lose economic development funding if they take someone's home or business for private commercial development. This is an appropriate response. Congress provides significant funding throughout the country for economic development. Currently that money is being used in projects that take property from one person and give it to another. Or it is being used in a way that gives a locality more money to spend on projects that take people's homes and businesses for private commercial development. If Congress wishes to ensure that federal money will not support the misuse of eminent domain, terminating economic development funds is the best approach.

Moreover, like H. Res. 340, passed shortly after the Kelo decision and condemning the result, the bill represents a strong statement that this awesome government power should not be abused. The states are currently studying the issue and considering legislative language, and they will certainly look to any bill passed by Congress as an example. The bill also specifically tells state and local government entities what funds they risk losing.

Conclusion

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes or businesses they love and watch as they are replaced with the condos and shopping malls that many localities find preferable to modest homes and small businesses. Federal law currently allows expending federal funds to support condemnations for the benefit of private developers. By doing so, it encourages this abuse nationwide. Using eminent domain so that another, richer, person may live or work on the land you used to own tells Americans that their hopes, dreams and hard work do not matter as much as money and political influence. The use of eminent domain for private development has no place in a country built on traditions of independence, hard work, and the protection of property rights.

Again, thank you for the opportunity to testify before this committee.

The CHAIRMAN. Thank you. Mr. Hance.

**STATEMENT OF EARL HANCE, PRESIDENT,
MARYLAND FARM BUREAU, INC.**

Mr. HANCE. Good morning, Mr. Chairman, ladies and gentlemen. My name is Earl Hance. I am a corn and soybean producer from Port Republic, Maryland. I am also President of the Maryland Farm Bureau, and I serve on the Board of Directors for the American Farm Bureau Federation.

I certainly appreciate the opportunity to be here today to discuss this potentially devastating impact of the recent Kelo decision on agriculture.

We commend this Committee for holding hearings on this important matter. And I ask that my written statement be submitted for the record.

The Kelo decision has struck a raw nerve around the country. We are gratified that so many Members of Congress have introduced and co-sponsored bills to address the situation. We fully support the efforts that have been taken thus far, and we will work diligently with this Committee and others to pass legislation to encourage states to limit their use of eminent domain to truly public uses.

Farmers and ranchers understand that circumstances arise in which their land can be designated for a legitimate public use. We cannot support the rationale of Kelo, however, that private property can effectively be taken for the profit of other private parties.

The difference between legitimate uses of eminent domain and what is so objectionable in Kelo is the difference between building firehouses or factories, between courthouses or condominiums. After Kelo, no property is safe. Any property can now be seized and transferred to the highest bidder.

As Justice O'Connor said in her stinging dissent, "The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

Agricultural lands are particularly vulnerable. The fair market value of agricultural land is less than residential or commercial property, making a condemnation of agricultural land less costly and more attractive. While agricultural lands are vital to the Nation because they feed our people, they do not generate as much property tax revenue as homes or offices.

Finally, municipalities generally grow outward into farming or rural areas. There is nothing to stop farms that have been in families for generations from being taken for industrial developments, shopping malls, or housing developments. Nowhere is this more true than in my State of Maryland, where land is already at a premium.

In the State of Maryland, many of you know that the Chesapeake Bay and its tributaries reach far and wide, and waterfront property is at a premium. And we are very concerned that after the Kelo decision, any development corporation could legitimately purchase one tract of land, and then present a project that was much larger in scope, and immediately have cause to take other land just for the creation of great tax revenue. That is the concern that in Maryland we have with this Kelo decision.

Reaction from our members to Kelo has been swift and overwhelming. Farmers and ranchers from across the state are asking us to help them keep their property. We are currently working with our state legislator to make more strict our state laws concerning condemnation to try to protect our agricultural lands.

Farm Bureau has initiated the Stop Taking Our Property campaign, or STOP. As part of the campaign, we have developed an educational brochure which models state legislation, and a web page for interested people. Representative STOP materials are attached to our written statement.

One key element to our campaign is to promote the message of H.R. 3405 or similar legislation. Since eminent domain is a creature of state law, substantive changes must be made at that level. Currently, 50 state legislatures have to act. However, it is an uncertain and lengthy process. That is why Federal legislation is so necessary.

Congress has the authority and the responsibility to determine how our tax dollars are spent. Using Federal funds to help municipalities take from the poor and give to the rich adds insult to injury to those who work hard for themselves and their families. Congress can ensure that state and local governments do not use a person's own tax dollars to dispossess them in favor of other private interests.

All of the Federal bills introduced thus far take this approach. The differences among them are the degree to which such funding

is withheld. While we support all the approaches taken in these bills, H.R. 3405 seems to offer the most effective deterrent to abuses of eminent domain.

Justice Stevens, who wrote the majority opinion in *Kelo*, seems to disagree with the state law he upheld. In a recent address, the Clark County, Nevada Bar Association, discussing this case, he said that "I was convinced that the law compelled a result that I would have opposed if I were a legislator."

Mr. Chairman, Farm Bureau strongly supports swift Congressional action on legislation to withhold Federal funding to states and local governments that use eminent domain to take property from one private entity and transfer it to another for economic development purposes.

Farmers and ranchers across this country have held onto their property for generations. They fought battles, they fought pests, they fought droughts, they fought low prices to hold onto that property. It appalls us that now we can lose that property which we have held for generations just because the property could create a higher tax revenue.

Thank you for the opportunity to be here today, and I would be pleased to answer any questions. Thank you.

[The prepared statement of Mr. Hance follows:]

**Statement of Earl Hance, President, Maryland Farm Bureau, Inc.,
on behalf of the American Farm Bureau Federation**

My name is Earl Hance and I am a corn and soybean producer from Port Republic, Maryland. I also operate several greenhouses. I serve as president of Maryland Farm Bureau, Inc., and serve on the Board of Directors of the American Farm Bureau Federation. I appreciate the opportunity to be here today to present testimony on behalf of the American Farm Bureau Federation. Farm Bureau is deeply concerned about the potentially devastating impacts of the recent *Kelo* decision on agriculture. We commend the committee for holding hearings on this important matter.

The *Kelo* decision has struck a raw nerve around the country. Congress responded swiftly to this outrageous decision through the introduction of H.R. 3405 and similar bills. H.R. 3405 and H.R. 3135 both have over 100 cosponsors and a companion bill in the Senate has more than 30 cosponsors. We fully support the efforts that have been taken thus far and we will work diligently to pass legislation to encourage states to limit their use of eminent domain to truly public uses.

Farm Bureau has a long history in support of private property rights. We have participated in property rights cases at the appellate and Supreme Court levels, including filing a "friend of the court" brief in the *Kelo* case in support of the homeowners.

Farmers and ranchers understand that there are legitimate public uses, such as roads and highways, which can have a claim on private land. However, we cannot understand—nor can we support—our land being taken for the profit of private corporations. The difference between legitimate uses of eminent domain and what is so objectionable in *Kelo* is the difference between building firehouses and factories, between courthouses and condominiums.

After *Kelo*, no property is safe. Any property can now be seized and transferred to the highest bidder. As Justice O'Connor said in her ringing dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping center, or any farm with a factory."

I would like to stress to the committee that agricultural lands are particularly vulnerable to these types of actions. The fair market value of agricultural land is less than residential or commercial property, making a condemnation of agricultural land less costly and more attractive. While agricultural lands are vital to the nation because they feed our people, they do not generate as much property tax revenue as homes or offices. As a result, they can easily become targets for being taken for any of these other uses. Finally, as municipalities grow, they naturally put pressure on farms and rural areas. There is nothing to stop farms that have been in families

for generations from being taken for industrial developments, shopping malls or housing developments.

Development pressures are particularly acute in my state of Maryland, where land is already at a premium. As the areas surrounding Baltimore and Washington, D.C. continue to grow, planners and developers increasingly look to agricultural lands for their next housing development or shopping mall. The Kelo decision opens up a whole new avenue for them.

We are understandably concerned about the possible impacts of Kelo on farm and ranchlands across Maryland and the country. Reaction from our members has been swift and overwhelming. Farmers and ranchers from across the state are asking us to help them keep their property.

Farm Bureau has initiated a Stop Taking Our Property (STOP) Campaign, designed to educate the public about the impacts of the Kelo decision and to provide materials to help state Farm Bureaus address the issue. The Maryland Farm Bureau has fully embraced this campaign and made it a cornerstone of our legislative efforts.

There are several components to the Farm Bureau campaign. One element focuses on educating the general public and our members about the Kelo decision and its impacts. We have developed an educational brochure and web page for those interested in the issue. Another element focuses on encouraging state Farm Bureaus to seek changes to state laws to prohibit the use of eminent domain for private economic development. We have developed model state legislation and supporting documents to help achieve those changes.

Another key element is to encourage and promote passage of H.R. 3405 or similar legislation. Since eminent domain is a creature of state law, substantive statutory change must be made at that level. Getting multiple state legislatures to act, however, is an uncertain and lengthy process. In addition, states interested in maximizing revenues may be reluctant to take action that might deny their municipalities the opportunity for increased property taxes.

That is why federal legislation is necessary. While eminent domain is defined by state law, Congress does have the authority and the responsibility to determine how our tax dollars are spent. Using federal funds to help municipalities take from the poor and give to the rich adds insult to injury to those who work hard for themselves and their families. As elected officials, you can appropriately respond to the Kelo decision by ensuring that states and local governments cannot use federal tax dollars to dispossess property for the benefit of another private entity.

All of the federal bills introduced thus far take this approach. The difference among them is the degree to which such funding is withheld. H.R. 3405 is the only one of the bills that would deny all federal economic development assistance to a state if there were any uses of eminent domain for economic development that transferred private property from one private entity to another.

We support the approach taken by all of these bills. Withholding all federal economic development funding from states where Kelo-type eminent domain is being used, whether or not it is used in the specific project, offers the greatest disincentive for states to continue using eminent domain for private economic development. By not tying the funds to any particular project, H.R. 3405 avoids the fiscal shell game of moving federal funds away from individual projects that use eminent domain for private economic development.

Though the Supreme Court said the Connecticut law was legal, not every Justice endorsed it as good policy. Even Justice Stevens, who wrote the majority opinion in Kelo, seems to disagree with the law he upheld. In a recent address to the Clark County (Nevada) Bar Association discussing the case, he said that "I was convinced that the law compelled a result that I would have opposed if I were a legislator."

We urge swift passage of legislation that would withhold federal funding to states and local governments that use eminent domain to take property from one private entity and transfer it to another for economic development purposes.

Thank you for the opportunity to testify. I look forward to answering your questions.

The CHAIRMAN. Thank you. Mr. Arroyo.

**STATEMENT OF MARIO ARROYO, PART OWNER,
ARROYO'S CAFÉ, STOCKTON, CALIFORNIA**

Mr. ARROYO. Thank you, Mr. Chairman. I appreciate the invitation and the opportunity to offer testimony of my personal story.

In May of 1999 property that my family business stood on for 29 years was taken by our downtown redevelopment agency in Stockton, California through the use of eminent domain. The three main objectives of the agency were to eliminate blight, preserve viable businesses, and to encourage citizens from outside the area to visit downtown.

Our business met all three criteria. We were never a source of blight, always maintaining a safe and clean environment for our patron. In fact, the developer that received the rights to our land was a major contributor to the problems in the area through a pool hall on the property he leased out, as well as a liquor store that he still owns.

Second, we were a viable business, as 29 years in one location should attest. In fact, in a March, 1993 draft report by the consultant firm of Keyser, Marston and Associates, they recommended that Arroyo's Cafe should be retained, and to avoid relocation of said business. The firm was hired by the redevelopment agency.

Third, our patrons came from all over Stockton and outside our city, as well, to dine in our restaurant, or to dance in our club area, or both. In our case, our case received media attention, and the local news stations aired segments on the process. The most impressive thing to me was the amount of letters and support that we received through the community.

The Deputy City Manager at the time came to us with three proposals that would allow us to remain on the property. One was agreed upon, and later she returned to say that the developer wanted all the property. In my view, this was then just to allow the developer to secure more tenants for a project.

I understand that at times eminent domain may be a necessity for public good. But our business, a successful restaurant that my father started in 1946, and at one location for 29 years, was relocated to provide for a gas station and a fast food restaurant. It was nothing short of a land grab, with no concern for private harm.

I feel that allowing developers with deep pockets to use and abuse eminent domain is contrary to what many Americans feel is a constitutional right to own land without fear of losing it. We had done no wrong, and we were in good standing with the community, paying taxes, contributing to charities, all the things that make good citizens. We should expect nothing but to be treated the same way.

This bill is exactly what we feel government should be: standing up for the common citizen. You saw a wrong, like the Kelo decision, and now you are trying to right it. This bill would bring nothing but more faith to the government by the common person, by protecting his rights.

And again, thank you very much. I am open to any questions, as well.

[The prepared statement of Mr. Arroyo follows:]

**Statement of Mario Arroyo, Co-Owner,
Arroyo's Café, Stockton, California**

In May of 1999 property that my family business stood on for 29 years was taken by our downtown redevelopment agency in Stockton, Ca through the use of eminent domain. The three main objectives of the agency were to; eliminate blight, preserve viable business, and to encourage citizens from outside the area to visit downtown.

Our business met all three criteria. We were never a source of blight always maintaining a safe and clean environment for our patrons. In fact the developer that received the rights to our land was a major contributor to problems in the area through a pool hall on his property he leased out as well as a liquor store he still owns.

Secondly, we were a viable business as 29 years at one location should attest. In fact in a March of 1993 draft report the Consultant Firm of Keyser, Marston and Associates, recommended that Arroyo's Café should be retained and to avoid relocation of said business. The firm was hired by the redevelopment agency.

Thirdly, our patrons came from all over Stockton and outside of our city some to dine in our restaurant others to dance in our club area or both. Our case received media attention as local news stations aired segments on the process. Most impressive to me was the amount of letters to the local newspaper (The Record) supporting our cause to stay at that location.

The deputy city manager at the time came to us with three proposals to that would allow us to remain on part of the property. One was agreed upon she later returned to say the developer wanted all the property. In my view this was done to allow more time for the developer to secure tenants for their project.

I understand that at times eminent domain may be necessary, for public good. But our business a successful restaurant my father started in 1946 and at one location for twenty-nine years was relocated to provide for a gas station with a fast food chain restaurant inside of it was nothing short of a land grab. With no concern for private harm.

I feel that allowing developers with deep pockets to use and abuse eminent domain is contrary to what many Americans feel is their right, to own land without the fear of losing it.

The CHAIRMAN. Thank you, Mr. Arroyo. And thank you to the entire panel.

I want to begin with Mr. Arroyo, who is a constituent who lives in my district. You had a restaurant that was in place for nearly 30 years, a family business. And you employed people in the neighborhood. You were part of what was downtown Stockton. And I have been in your restaurant many times, I think most of my staff has been there many, many times.

We were all surprised when your property was taken. But I think what shocked me, and I think most of Stockton even more, was to see that a McDonald's took the place of what was a Stockton institution.

I do not understand who thought that was a good idea. But it is my understanding that under California law, they can take your property if they consider it blighted.

Mr. ARROYO. That is correct.

The CHAIRMAN. They considered you part of the blight in downtown Stockton?

Mr. ARROYO. No. Actually when our case went to trial, they could not bring up any reason or any cause that would suggest blight. On the contrary, the developer contributed to the blight and to the actual crime in the area by maintaining a liquor store around the corner. But there was no police records; we had no problems with any kind of a blight or crime from our business.

The CHAIRMAN. Then why were they able to take it? Because I have been told repeatedly by opponents of this legislation that in a state like California, the only way they can take your property under eminent domain is if it is blighted.

Mr. ARROYO. That is contrary to what happened to us. When we went to trial, even the Judge saw that there was no resolution of necessity to take our property, but she still sided with the developers at the end of trial.

The CHAIRMAN. So when opponents of this legislation, particularly in California, because every state has different laws when it comes to the use of eminent domain within that state. But when opponents say that the only way they can take property is if they condemn it and have it declared blighted by the city or the county, that is not what happened in your case. They just had a different use that they wanted for your property, so they took it.

Mr. ARROYO. Absolutely. The developer made it known that he wanted all the property. And even though we were offered three different plans to stay on the property, since the developer didn't accept either one of those, we were taken off the property.

They had about nine years before we went to trial. And even though everything seemed to be in our favor, just because they had deeper pockets, they were a larger group of investors, they were allowed to take our property. And now on my property sits a Union 76 station and a McDonald's, which incidentally does not have as many employees as we had at that time.

And because the gas station opened on that block, a gas station just one block north of that closed. So actually the tax dollars were basically balanced out.

The CHAIRMAN. Was that the Chevron?

Mr. ARROYO. The Chevron station, right. It is closed now.

The CHAIRMAN. Were you able to relocate your business?

Mr. ARROYO. Yes, we were. And when the City came to us and offered different properties, they offered us properties that were not even for sale. And to eliminate going and trying to do this to someone else, we purchased property that was for sale by a different property owner in North Stockton. We did not want to impose this kind of dealings with anybody else. They offered us quite a few properties that I think had, the property owners had no intention of selling.

The CHAIRMAN. You were compensated the fair market value for your property

Mr. ARROYO. Right. They decided on fair market value, and that is what we received.

The CHAIRMAN. And I am glad you put it that way. They decided the fair market value, and that is what you received.

Mr. ARROYO. Right.

The CHAIRMAN. The fair market value of your property, the definition of fair market value is what you would be willing to sell it for, and what somebody would be willing to pay you for it.

Mr. ARROYO. Right. We saw other properties in the vicinity, with the same amount or close amount of square footage. And they were going at a higher rate than actually what we received.

The CHAIRMAN. And if your restaurant were still in the same location, there is now a baseball stadium, a new soccer stadium, a multi-screen movie theater, a number of new businesses that have been located in that area over the last few years. Would that have changed the value of that property?

Mr. ARROYO. Oh, absolutely. It would have went up 20 times the amount maybe what it was valued at in 1999. The only reason the city government was interested in our property after being there such a long time was the completion of a crosstown freeway that connected two major interstates. Before that, there was no concern

about us. Some of the people didn't even bother to go down in that area.

The CHAIRMAN. I thank you for making the effort to be here and be part of this hearing. I know that, as a small business owner, it is very difficult for you to take time away from your business. And I appreciate you making the effort to be here and testify before the Committee, and share your experience with the Committee, because I do believe it is very helpful in moving forward. So thank you very much.

Mr. ARROYO. Thank you, Chairman.

The CHAIRMAN. Ms. Herseth.

Ms. HERSETH. Thank you, Mr. Chairman. I would like to thank all the members of the panel today.

Let me just start with you, Mr. Gall. You had mentioned in your testimony that since the Kelo case, you actually witnessed an uptick of the type of eminent domain authority that was exercised for economic development reasons.

Can you tell me, given the actions in the House, with this legislation, the resolution that was passed overwhelmingly earlier this summer, has it plateaued off? Or is there still this uptick of this type of activity in local communities trying to beat the actions that Congress may take to stave off this type of activity?

Mr. GALL. Well, unfortunately, the uptick after Kelo has continued. And I think certainly many people may be wanting to get in under the wire in terms of any legislation that Congress may propose.

We issued, and I would be glad to provide to the Committee a press release on the floodgates and how that had opened in terms of condemnations that were filed subsequent to the Kelo decision. But before Kelo, a lot of cities had operated with a little bit of doubt as to what they were doing was legal, but people weren't challenging them. They could proceed under their urban renewal laws, and slap blight designations or things like that on particular pieces of property.

But now, after Kelo, the Court has said all it really takes is you think you can make more money off the land than someone else. So now that that cloud has been removed, you know, the cloud in the perspective of developers and officials, they want to press full steam ahead.

Ms. HERSETH. I raise this question, Mr. Chairman, because we may want to look at our legislation and any others in terms of effective dates, particularly with the resolution that passed the House overwhelmingly. I want to send a clear message to the country so that it is not just maybe necessary the date of the enactment of the Act, but I mean, we put folks on notice with that resolution. So I wanted to raise that for that purpose.

And then Mr. Hance, I appreciate the efforts of you and other members of the American Farm Bureau Federation, particularly with the efforts to set forth some model legislation for state legislatures. Do you know, in your monitoring activity of what state legislatures are doing—now, some, like in South Dakota, are only in session for two months out of the year, but already some discussions about moving forward to introduce legislation when they go into session in January—do you know how many states have

actually taken action to limit local governments or economic development authorities from exercising eminent domain power for economic development?

Mr. HANCE. To my knowledge, there is one or two.

The CHAIRMAN. If you would just identify yourself for the record, so that we have that.

Mr. KRAUS. I am Rick Kraus. I am the Senior Regulatory Director for the American Farm Bureau.

There have been two states that have taken, actually three states that have taken action since the Kelo decision was announced. The first was Alabama; they restricted the use of eminent domain for private economic purposes. The second was Texas, and the third was Delaware, which we recently did, just in the past couple months.

We have heard probably from, in our State Farm Bureaus, we have heard probably about 20, 25 states that we know that are moving forward with the coming session. Some states were in session earlier this year, by annual basis, and don't meet until the following year, until 2007. So, but there are probably 20, 25 states already that we know of that are working on this, including Maryland.

Mr. HANCE. Our session, as yours, does not start until January, but we have already begun discussions with both parties. And I am happy to announce that we have strong bipartisan support to do something to strengthen the condemnation requirement so that agriculture will be protected.

Ms. HERSETH. Thank you, Mr. Hance. And just one last comment, Mr. Chairman.

Mr. Arroyo, Chairman Pombo shared with us, with the Members of this Committee and the Agriculture Committee, some examples from activities that have taken place in his district and other locations within California that have been particularly egregious. And it has made a strong impact on all of us.

But to hear from you directly today has been very important. For me, I wish more Members of the Committee were here to hear from you directly today.

But let me just say that we appreciate the fact that you are here. And one of the comments that you made about a consulting firm's report to the local economic development authority is precisely the kind of evidence that a business like yours, or other individual, whether it be a home or a farm or ranch, would be able to point to to support your private right of action under this important legislation.

So thank you for being here today.

Mr. ARROYO. Thank you.

Ms. HERSETH. Thank you, Mr. Chairman.

The CHAIRMAN. If I could, I would like to address a question to the two attorneys that are on the panel. It relates to what Mr Arroyo has talked about.

In our Constitution we have the protection on private property. And the protection starts where no person shall be deprived of life, liberty, or property. And that is our constitutional mandate.

It goes on to state "nor shall private property be taken for a public use without just compensation." As if the exception to no person

shall be deprived of property is, if you have to have it for a public use, you have to pay for it.

In this case, what we had was the government stepping in and taking someone's property not for a public use, but for a private economic development. As was the case with *Kelo v. New London*.

It is my position, my argument, that we should be protecting people's property to the point that it is an extremely rare occurrence that eminent domain would ever be used, and it would have to be a very clear public use before we would take that property. Not what is, and I wrote down what you called a public purpose. That is not in the Constitution anywhere about a public purpose. There was an exception made on a public use.

So what this legislation is attempting to do is use our power of the purse to enforce what is a constitutional mandate. So how do we go back now, even though we can control the money, how do we go back and fix what obviously was a very wrong court decision that actually makes this legal for them to do that? What possible legislation could be introduced that actually goes back to what the Constitution says?

Ms. WALLY. Mr. Chairman, I think that is an excellent question. I think this legislation represents an important first step. As you said, Congress controls the purse, and this legislation makes very clear that economic development purposes will not be funded by Congress.

I think other legislation that is being passed currently before Congress is another excellent step in enforcing Constitutional mandates, such as requiring just compensation for any deprivation of private property, whether it be physical or economic. And that is an important part of our Constitution as well, to make sure that property owners do get just compensation as we have discussed.

We have discussed that the government often defines what just compensation is. And this is often unfair to property owners. I don't know if my colleague would have anything to add.

Mr. GALL. Well, certainly Congress can do a lot through the spending clause power.

Eminent domain has traditionally been a state power, and a local power. So that is why what is going on in state legislatures is so very important right now, because those states can pass legislation that directly proscribes the actual use of eminent domain by cities and towns for private use for private commercial development. And states will be considering not only state legislation, but state constitutional amendments.

And as Justice Stevens pointed out in the majority for *Kelo*, states can provide a greater level of protection than the U.S. Supreme Court chose to provide.

The hope certainly is that states will provide this increased protection; that Congress will use the power of the purse here, and send us in the momentum of a change. You know, once again, in public use jurisprudence, back to what the founding fathers understood when they said public use. This is the despotic power, and should only be used in the very, very limited set of circumstances.

And hopefully the *Kelo* decision will be overturned one day. But until that time, Congress and the states can have a lot to say about that.

The CHAIRMAN. Congressman Otter, in his testimony earlier, talked about what a public use was. And at the time the Constitution was drafted, Congressional power was, Federal government power was very limited. There were 17 different areas that our founding fathers said that Congress could pass laws affecting.

When they talked about public use at that time, it was extremely limited as to what was envisioned at that time as a public use. We were talking about roads, military bases, post offices. It was very, very limited as to what anyone envisioned it to be used for.

We have seen that change over the years. We have seen the power of the Federal government expanded dramatically over the years.

But when they talked about a public use in the Constitution, it was a very limited set of circumstances that they ever envisioned that that could be used for. We have seen that expanded dramatically. And granted, states and local governments have dramatically more power than the Federal government should have, but in the Constitution what we were able to use or declare as a public use was very, very limited. And we have seen that expanded to the point where, through regulation and through law, we are taking private property rights. And taking substantial value away from private property owners.

I would like to ask you something that I asked the first panel about, and that is dealing with the differences in private property protection. Do you see there being any difference whatsoever between Mr. Arroyo's restaurant and the farmer who lives a few miles away and his land? Is there any difference in the Constitution about the protection of private property based on the size of the property, or the use of the property?

We have a representative from the Farm Bureau who testified, and the Farm Bureau has been very involved with this. These two gentlemen right here, one grows soybeans and one owns a restaurant. Is there any difference in the property rights protection in the Constitution for these two gentlemen, and what they should expect from the courts and from their government?

Ms. WALLY. No. The Constitution makes no distinction between any kind of private property.

Mr. GALL. None whatsoever. The Constitution makes no distinction. And the really bad thing about the Kelo decision, of course, though, is it says those with more, those with more property, those with more resources are in a better position to take advantage of Kelo and to take property from those who are generating less profits with their property.

So no, there is none, and there should be no distinction.

The CHAIRMAN. Well, I appreciate that. That is something that I believe Congress has to be very, very careful of. Because when we start to differentiate between the use, location of property, and the level of protection that we are going to grant, I believe that we are making a fundamental mistake in understanding constitutional protections.

There has been legislation introduced that does differentiate between property. It is the use of that property and the level of protection that we would give. And I believe that that is a very, very

dramatic mistake that Congress would be making if we were to go down that path.

I appreciate all of you making the effort to be here and be part of this hearing. Obviously this is an issue that the Congress is moving on very rapidly. It is something that, in Congressional terms, not only is it bipartisan and bicameral, but it is something that, rare here, is moving very quickly. So I appreciate you making the effort to be here, and your valuable testimony on this issue.

So thank you all very much.

If there is no further business before the Committee, the Committee now stands adjourned.

[Whereupon, at 11:30 a.m., the Committee was adjourned.]

